Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

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Failure to read arbitration clause in contract does not excuse compliance. Following California precedent in *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, [53 Cal.Rptr.2d 515], the Ninth Circuit concluded that arbitration may be compelled even if the party preparing the contract fails to call the other party's attention to an arbitration clause and even if that party was unaware of the clause when signing the contract. *Nagrampa v. Mailcoups, Inc.* (9th Cir., March 21, 2005) 401 F.3d 1024, [2005 DJDAR 3286]. The court quoted Brookwood for the proposition that the contracting party "was bound by the provisions of the [arbitration] agreement regardless of whether [she] read it or [was] aware of the arbitration clause when [she] signed the contract." The court also held that any claim that the arbitration clause should not be enforced because it was contained in a contract of adhesion must be decided by the arbitrator and not by the court.

Voluntary payments made after expiration of CCP § 998 offer are treated as part of the judgment. Where defendant made a voluntary payment to plaintiff, after plaintiff's offer under *Code Civ. Proc.* § 998 expired, the amount of the payment is added to the amount of the judgment to determine whether plaintiff obtained a result more favorable than the offer. *Arias v. Katella Townhouse Homeowners Assn., Inc.* (Cal. App. Fourth Dist., Div. 3; February 21, 2005) 127 Cal.App.4th 847, [26 Cal.Rptr.3d 113, 2005 DJDAR 3315].

Under federal rule, defendant who causes unnecessary service of process costs must reimburse plaintiff, regardless of who prevails in the action. Federal Rule of Civil Procedure 4(d)(2) imposes a duty on parties to avoid unnecessary expense for service of process. In *Darulis v. Garate* (9th Cir., March 22, 2005) 401 F.3d 1060, [2005 DJDAR 3378], defendant refused to waive service of process. The court held that this imposed unnecessary costs on plaintiff and plaintiff could recover these costs, even though he lost the case. California would probably apply a similar rule. *California Code of Civil Procedure* § 415.30 (d) entitles plaintiff to recover expenses incurred in serving and attempting to serve the defendant if the defendant fails to return an acknowledgement of service within 20 days after service by mail.

Whether acts by disqualified judge are void is before the Supreme Court. In February, we reported on *Hartford Casualty Insurance Co. v. Superior Court*, (Cal. App. Second Dist., Div. 5; December 22, 2004) 125 Cal.App.4th 250, [22 Cal.Rptr.3d 507, 2004 DJDAR 15199], where the Second District Court of Appeal, Division Five held that, where a judge discovered, after denying a motion for summary adjudication, that he was disqualified because of prior contacts with an ADR provider, the order was void. The California Supreme Court has granted review, (Case No. S131554, March 23, 2005) 109 P.3d 68, so the case may no longer be cited.

Under CCP § 998, successful plaintiff may recover expert witness fees even though these fees were paid by their insurers. *California Code of Civil Procedure* § 998 provides that the court may award expert witness fees incurred by a party when the judgment is less favorable than an offer made under the statute. In *Skistimas v. Old World Owners Association* (Cal. App. Fourth Dist., Div. 3; February 25, 2005; ordered published March 24, 2005) 127 Cal.App.4th 948, [26 Cal.Rptr.3d 319, 2005 DJDAR 34785], the trial court had held that, where defendants' insurer, rather than defendants personally, had paid such fees, the defendants did not "incur" the expenses and thus was not entitled to recover them. Relying on cases holding that parties may recover attorney fees even though they did not have a personal obligation to pay them, the Court of Appeal disagreed, holding that the statute does not specify "that any particular person must have incurred the expert witness fees, just that the fees must have been actually incurred."

Statute mandating relief from default based on lawyer fault applies, even though the lawyer is only licensed in another jurisdiction. *California Code of Civil Procedure* § 473 (b) mandates that the trial court grant relief from default where the lawyer for the defaulting party files an affidavit stating the default resulted from her or his mistake, inadvertence, surprise, or neglect. In *Rodrigues v. Superior Court* (Cal. App. Sixth Dist.; March 24, 2005) 127 Cal.App.4th 1027, [26 Cal.Rptr.3d 194, 2005 DJDAR 3485], the court held that this requirement applies even where the lawyer is only admitted to practice in another jurisdiction.

Hospital may not assert a lien for difference between agreed charges and "usual and customary charges." Hospitals that contract with health insurers to accept less than their usual charges as "payment in full," have asserted lien claims under the *Hospital Lien Act* (*Civ. Code*, § 3045.1-3045.6) in personal injury actions for the difference between the payments received and the "usual and customary charges" for the services rendered. They can do so no longer. *Parnell v. Adventist Health System/West* (Cal.Supr.Ct.; April 4, 2005) 35 Cal.4th 595; [109 P.3d 69, 2005 DJDAR 3864].

Criminal case regarding appellate jurisdiction may have implications for civil cases. In *People v. Nickerson* (Cal. App. Third Dist.; April 4, 2005) 128 Cal.App.4th 33, [26 Cal.Rptr.3d 563, 2005 DJDAR 3943] the Court of Appeal held that where a defendant is charged with both a misdemeanor and a felony, and after the preliminary hearing the magistrate strikes the felony, an appeal from a subsequent conviction of the misdemeanor lies with the Appellate Division of the Superior Court and not with the Court of Appeal.

This case might implicate appellate jurisdiction in a civil case that starts out as an unlimited jurisdiction case, but, because of pretrial rulings (e.g., reducing damages which may be claimed to less than $25,000) becomes a limited jurisdiction case. Does this mean that an appeal from the resulting judgment should be filed in the Appellate Division of the Superior Court? Until this issue is clarified, it might be wise to file notices of appeal directed to both courts when confronted with this situation.

New two-year statute of limitations for personal injuries applies to actions not already time-barred by prior one-year statute. By legislation effective January 1, 2003, the statute of limitations for actions for personal injury was increased from one to two years. *Krupnick v. Duke Energy Morro Bay* (2004) 115 Cal.App.4th 1026, [9 Cal.Rptr.3d 767], held that the amended statute could not be applied to revive claims that had already lapsed. But *Andonagui v. The May Department Stores Co.* (Cal. App. Second Dist., Div. 5; April 13, 2005) 128 Cal.App.4th 435, [2005 DJDAR 4229], held that where the one year statute had not already run on the effective date of the amended statute, the two-year statute of limitations applied.

After a grant of summary judgment, motion for reconsideration is improper but may be treated as a proper motion for a new trial. *California Code of Civil Procedure* § 1008 (a) provides that after a trial court issues an order, the losing party may ask the court to reconsider its decision if certain conditions are met. But, such a motion may not be considered after entry of judgment. *See, Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859, [107 Cal.Rptr.2d 841, 24 P.3d 493]. Thus, the motion is improper after a summary judgment has been entered. Rather, the proper procedure to seek reconsideration is to move for a new trial. However, the court has discretion to treat an improper motion for reconsideration after summary judgment has been entered as a motion for a new trial. *Sole Energy Co. v. Petrominerals Corp.* (Cal. App. Fourth Dist., Div. 3; April 5, 2005) 128 Cal.App.4th 212, [2005 DJDAR 4042].

Participate In The Discussion Board Excitement

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If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to:
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Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, click here.